IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

AMBER ARD **PLAINTIFF**
AND JOHN DOES 1 – 10

V. **CIVIL ACTION NO: 3:12-cv-2-TSL-JMR**

STEVE RUSHING, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF LINCOLN COUNTY, MISSISSIPPI; TIM MILLER, INDIVDIUALLY AND IN HIS OFFICIAL CAPACITY AS JAILOR/DEPUTY OF LINCOLN COUNTY, MISSISSIPPI; LINCOLN COUNTY, MISSISSIPPI; AND JOHN DOES 1 THROUGH 10 **DEFENDANTS**

SHERIFF STEVE RUSHING (OFFICIALLY) AND LINCOLN COUNTY, MISSISSIPPI'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now Sheriff Steve Rushing, in his official capacity, and Lincoln County, Mississippi, by and through counsel, and submit their Memorandum of Authorities in Support of Motion for Summary Judgment as follows:

INTRODUCTION

Plaintiff's claims arise out of her June, 2010, incarceration in the Lincoln County Jail ("LCJ"). *CM/ECF Doc. No. 1*. More specifically, the Plaintiff alleges that while housed in the LCJ, former Lincoln County Jailer Timothy Miller sexually assaulted her. *Id*. at ¶ 7. The Plaintiff contends that Miller's sexual assault amounted to a violation of her constitutional rights and that Lincoln County is responsible for the same. As explained in detail herein, Plaintiff's claims are meritless and the defendants are entitled to a judgment as a matter of law.

SUMMARY OF FACTS

The Plaintiff was arrested around noon on June 9, 2010 for a drug-related probation violation. *Pl. Depo.*, p. 16, 28, 31-32. After being booked in to the LCJ, the Plaintiff was taken upstairs to an area that was temporarily being used to house female inmates. *Pl. Depo.*, p. 23-24; *Rushing Depo.*, p. 8-9. Female inmates are normally housed on the first floor of the LCJ, just outside the booking area; however, at that time, the LCJ was renovating its female housing area on ground floor. *Rushing Aff.*, ¶ 5; *Rushing Depo.*, p. 8-9. Ongoing construction required Lincoln County Sheriff Steve Rushing to temporarily house all female inmates upstairs. *Id.* at p. 9.

To enter the temporary female area where the Plaintiff was housed, one has to go up a set of stairs, through a key-locked door, down a hallway, through another key-locked door, through a 15x30 foot room and, finally, through a third key-locked door. All three doors are kept locked at all times. *Id*. at p. 9; *Rushing Aff.*, ¶ 6; *Pl. Depo.*, p. 25. Furthermore, the hallway in question has a camera providing a live video feed that captures any person going in the first locked doorway to the female area. *Rushing Depo.*, p. 17, 20, 27; *Rushing Aff.*, ¶ 7; *Pl. Depo.*, p. 24-25. The video feed plays on monitors in a guard tower upstairs and the control room downstairs. *Rushing Depo.*, p. 17-18. The upstairs guard tower is usually staffed with a jailer on each shift; however, the control room is staffed by a jailer twenty-four (24) hours a day, seven (7) days a week. *Id*. at p. 18-20; *Rushing Aff.*, ¶ 7. Significantly, prior to Plaintiff's alleged assault, there was a sign posted just outside the temporary female area upstairs as well as near the permanent female area on the first floor stating:

NO MALE JAILERS ARE TO ENTER THE FEMALE'S CELL WITH OUT A FEMALE JAILER OR DISPATCHER WITH THEM. NO EXCEPTIONS!!!

See, *Policy Sign*; *Rushing Depo.*, p. 7-8, 10-11, 42; *Rushing Aff.*, ¶ 8 .

According to the Plaintiff, in the early morning hours of June 11, 2010, Miller appeared in her cell at the foot of her bed, before the lights came on. *Id.* at p. 29-32. The Plaintiff testified that she had violated her probation by "failing a drug test" and that when Miller appeared she was "just getting things straightened out with [her] mind." *Id*. at p. 31-32. The Plaintiff asserts that she "jumped up" and asked Miller what he was doing in her cell. *Id*. According to the Plaintiff, Miller made small talk with her and offered her cigarettes which she accepted. *Id*. at p. 29, 31-33. The Plaintiff contends that as Miller was leaving her cell, he asked her what she was going to do for him since he brought her cigarettes. *Id.*at p. 33. The Plaintiff laughed and jokingly said "[y]ou need to go home and get that from your wife." *Id*. The Plaintiff alleges that Miller then left. *Id*. at p. 33-35. Notably, the Plaintiff did not report Miller's presence in her cell to **anyone** employed with Lincoln County. *Id*. at p. 36.

According to the Plaintiff, the next substantive contact she had with Miller was the following morning, before the lights were on. *Id*. at p. 36. Although the Plaintiff cannot recall any specifics, she contends Miller appeared in her cell alone and made "sexual advances" towards her. *Id*. at p. 37-40. The Plaintiff refused to have sex with

Miller telling him to "go home" to his wife. *Id*. at p. 40. The Plaintiff contends Miller left her cell only to return later. *Id*. at p. 41-43. Miller purportedly took the Plaintiff by the arm, forced her into a cell next door and attempted to force the Plaintiff to perform oral sex on him. *Id*. at p. 45-49. The Plaintiff contends she resisted his efforts however, eventually; he shoved her down and forcibly penetrated her. *Id.*

Miller admits to sexual contact with the Plaintiff and, in fact, pled guilty to the same; however, Miller contends he and the Plaintiff engaged in consensual sexual activity. See, *Sentencing Order* (CLT-000063); *Miller Depo.*, p. 14, 20-21.

Regardless of whether or not the activity was consensual, the Plaintiff did not report her alleged assault that morning or even that day. *Pl. Depo.*, p. 51, 55. Rather, the Plaintiff waited until the following evening to report the alleged incident. *Id.*

Upon learning of Plaintiff's allegation, Sheriff Rushing contacted the Mississippi Bureau of Investigation ("MBI") and an investigation ensued. *Rushing Depo.*, p. 27-29. Eventually, Miller admitted that the Plaintiff performed oral sex on him and he pled guilty to a charge of sexual contact with an inmate. *Rushing Depo.*, p. 30-31, 50.

Miller was fired from his employment with Lincoln County prior to pleading guilty for sexual contact with an inmate. *Rushing Depo.*, p. 29-31. In particular, Miller was fired for violating Sheriff Rushing's posted policy prohibiting one on one contact between male jailers and female inmates. *Id*.

CLAIMS

On November 23, 2011, the Plaintiff filed suit against Miller, Sheriff Steve Rushing (officially and individually) and Lincoln County asserting both state and federal claims. *CM/ECF Doc. No.1-2*. Plaintiff's state law claims were dismissed on February 12, 2012. *CM/ECF Doc. No. 7*. Similarly, the federal claims asserted against Sheriff Rushing, individually, were dismissed by this Court on August 30, 2012. *CM/ECF Doc. No. 33*.

In spite of the above, the Plaintiff continues to press her claims against Lincoln County.[1] Plaintiff's remaining claims are meritless and must be dismissed.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that a summary judgment will be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has explained that the language of Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case and on which that party will bear the burden of proof at trial." *Celotex*

[1] Inasmuch as Plaintiff's claims verses Rushing officially are nothing more than claims against the County, Lincoln County and Sheriff Rushing will hereinafter be collectively referred to as "Lincoln County." *Hafer v. Melo*, 502 U.S. 21 (1992).

Corp. v. Catrett, 477 U.S. 317, 322 (1986). The movant "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact... [t]he non-moving party must then go beyond the pleadings and designate 'specific facts showing that there is a genuine issue for trial.'" *Harris v. Mississippi Valley State Univ.*, 899 F.Supp. 1561 (N.D. Miss. 1995), citing, *Celotex,* 477 U.S. at 324. Here, there are no genuine issues of material fact and Lincoln County is entitled to a judgment as a matter of law.

ARGUMENT

A local government, like Lincoln County, can be held liable under Section 1983 for violating a citizen's constitutional rights but only if "the governmental body itself 'subjects' [that] person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). Governmental entities are "responsible only for [their] own illegal acts" and are "not vicariously liable under § 1983 for [their] employees' actions." *Id*. Thus, there is no *respondeat superior* liability under Section 1983; rather, the key to municipal liability is demonstrating that a deprivation of a constitutional right was inflicted pursuant to an official policy or custom of the municipality in question. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978). Simply put, the unconstitutional conduct asserted "must be directly attributable to the municipality through some sort of official action or imprimatur." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

Here, to establish liability against Lincoln County, the Plaintiff must demonstrate (1) an official policy or custom, of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy or custom. *Rivera v. Houston Indep. Sch. Dist*, 349 F.3d 244, 247-249 (5th Cir. 2003). A "policy or custom" can be either (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or (2) a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. *McGregory v. City of Jackson*, 335 Fed. Appx. 446, 448-449 (5th Cir 2009). The Plaintiff must also demonstrate a link between the policy and the constitutional violation, and the policy must be maintained with "objective deliberate indifference" to a constitutionally protected right. *Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir. 2002). A municipality acts with objective deliberate indifference if it promulgates a policy or custom despite the "known or obvious consequences that constitutional violations would result." *Piotrowski*, 237 F.3d at 567. Deliberate indifference of this sort is a stringent test, and "a showing of simple or even heightened negligence will not suffice" to prove municipal culpability. *Id.*at p. 579 (5th Cir. 2001).

I. FAILURE TO PROTECT

The Plaintiff asserts that Lincoln County is liable to her for failing to protect her from Miller's alleged sexual assault. As noted in the Court's Memorandum Opinion (CM/ECF Doc. No. 33), the Plaintiff has alleged the violation of a clearly established right insofar as she has alleged that she suffered a sexual assault from a guard while an inmate at the LCJ[2]. *Opinion*, p. 6. Nevertheless, in addition to proving that she suffered an underlying constitutional violation, to succeed against Lincoln County, the Plaintiff must demonstrate that a County policy or custom was the "moving force" behind the constitutional violation and that the policy was maintained with "objective deliberate indifference." *Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir. 2002).

Here, the Plaintiff cannot demonstrate that any policy of Lincoln County was the "moving force" behind her alleged assault. To the contrary, the record evidence establishes that Lincoln County had safeguards in place to ensure the safety of female inmates. *Opin.*, p. 8-12. In particular, prior to Plaintiff's alleged assault, Lincoln County enacted a policy specially prohibiting male jailers from one on one contact with female inmates. *Rushing Depo.*, p. 29-31. This policy was clearly explained to all jailers and, furthermore, was posted in both areas where females were housed when the Plaintiff was housed in the LCJ. *Id.* at p. 7-8, 13-16, 19-20, 23; Policy Sign; *Miller Depo.*, p. 10-12, 19-20. Miller, the alleged perpetrator of Plaintiff's purported sexual assault, admitted

[2] Certainly, Lincoln County does not concede that the interaction between the Plaintiff and Miller was anything other than consensual; however, for purposes of this Motion, the Court must consider the Plaintiff's allegations that she was sexually assaulted as true.

that he was well aware of this policy and admitted that signs were posted in the jail reminding jailers of this policy. *Id*.

Furthermore, Lincoln County structured work shifts to ensure that a female jailer was on shift twenty-four hours a day, seven days a week. *Rushing Depo*., p. 10-11, 17-20, 23-24, 42; *Rushing Aff*., ¶ 8-9. Significantly, the jailer work schedule was administered in a way that a female jailer was always scheduled to be on no matter what shift or day. *Id*. Simply put, the schedule was set up to ensure that a female jailer was "on shift" twenty-four hours a day, seven days a week. *Id*. Even when a female jailer called in sick, another female jailer was called in to replace the sick female jailer. *Rushing Depo*., p. 24. Finally, the female cells within the female block are equipped with intercoms for inmates to contact jailers if a problem or need arose. *Id*. at p. 25, 48.

In summary, the record evidence reveals that Lincoln County had policies in place to make certain female inmates were housed in a safe and secure manner. Because the Plaintiff cannot demonstrate her alleged constitutional violation was caused by a Lincoln County policy, her claim must be dismissed.[3]

II. Failure to Supervise

The Plaintiff also appears to allege a failure to supervise claim. A municipality's failure to supervise its employees can, under certain circumstances, constitute a policy capable of subjecting it to liability under §1983. *City of Canton, Ohio v.* Harris, 489 U.S. 378, 381 (1989). The same standards of fault and causation apply to an individual

[3] Even could the Plaintiff demonstrate that a Lincoln County policy was the "moving force" behind any constitutional violation, she cannot demonstrate that policy was maintained with deliberate indifference.

supervisor's liability and the liability of a municipality for failure to supervise. *Lewis v. Pugh*, 289 Fed. Appx. 767, 771 (5th Cir. 2008).

Thus, to succeed on a failure to supervise claim here, the Plaintiff must show that (1) the County failed to supervise its employees; (2) that the failure to supervise amounted to deliberate indifference; and (3) that there is a direct causal link between the failure to supervise and the alleged constitutional violation. *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998). With respect to the third prong, the Fifth Circuit has stated that: "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Lewis v. Pugh*, 289 Fed. Appx. 767, 772 (5th Cir. 2008). Significantly,

> [P]roof of more than a single instance of lack of supervision causing a violation of constitutional rights is required before such lack of supervising can constitute deliberate indifference. *Thompson v. Upshur County*, 245 F.3d 447, 458 (5th Cir. 2001). Instead, the plaintiff must generally demonstrate that the municipality or supervisor had notice of a pattern of prior acts "fairly similar to what ultimately transpired." *Davis*, 406 F.3d at 383; see also *Thompson*, 245 F.3d at 458.

Id.

Here, as previously explained in Sheriff Rushing's Memorandum of Authorities in Support of Motion for Summary Judgment, the Plaintiff cannot demonstrate a failure to supervise claim. *CM/ECF Doc. No. 26*; see also, *Rushing Depo.*, p. 4-6, 16-22; *Rushing*

Aff., ¶ 3. There is no evidence that Lincoln County failed to supervise Miller and, even could the Plaintiff demonstrate a failure to supervise, the Plaintiff cannot demonstrate that, that failure amounted to deliberate indifference. That is, the Plaintiff has failed to provide evidence that Lincoln County was on notice "of a pattern of prior acts 'fairly similar to what ultimately transpired.'" *Id.*, citing, *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). More specifically, the record evidence reveals that Miller was a certified jail officer and that the County had not received any written complaint asserting that Miller was engaged in sexual harassment or sexual contact with inmates. *Rushing Depo.*, p. 32.

Although a former inmate asserted that Miller sexually assaulted her while housed in the LCJ in November, 2006, those allegations were investigated by the Mississippi Bureau of Investigations ("MBI") and no charges ever resulted from that investigation. In particular, in November, 2006 Lincoln County received a report alleging inappropriate conduct going on in the LCJ. *Bairfield Aff.* ¶ 3. As such, the County contacted MBI to perform an investigation. *Id.* MBI officer Gerald Wall investigated the matter and determined there was nothing to the allegations. *Id.* at ¶ 4. No criminal charges were ever filed as a result of the investigation and the inmate failed to take any action herself by filing an criminal affidavit or pursuing a civil suit. *Id.* at ¶ 4. MBI never reported to Lincoln County any finding that Miller had assaulted any female inmate.

The only other alleged incident involving Miller was a "jail house rumor" in October or November, 2009. *Rushing Aff.,* ¶ 11. At that time, Lincoln County Sheriff Steve Rushing heard a rumor that Miller had asked a female inmate to show him her breasts. *Id*. Rushing had the same investigated but the rumor was never substantiated. *Id*. In particular, Lincoln County Deputy Johnny Hall, Rushing's chief deputy, interviewed each female inmate then housed in the Lincoln County Jail and (1) no female inmate told him that Miller made the comment to her; (2) no female inmate told him they had heard Miller make the comment; and finally (3) no female inmate told Hall any other inmate had said Miller made the alleged comment to them. *Aff. of J. Hall*, ¶ 2-3. Simply put, the investigation into Miller proved the allegation to be unfounded. *Id*.

There is no "pattern" of similar violations here and Rushing's actions were far from deliberately indifferent. As noted above, both incidents were investigated and neither investigation resulted in criminal charges being pursued. Even though the incidents in question were unfounded, following the 2009 rumor, Rushing posted signs reiterating his long time policy that prohibited one on one access between male jailers and female inmates. Employees were verbally trained on the policy, signs were placed both upstairs and downstairs reiterating the policy and Rushing constantly reinforced and reminded officers of the policy. *Rushing Depo*., p. 9-11, 12, 14-16, 32-33. Miller himself admitted that he was aware of the policy and admitted seeing the signs. *Id*. at p. 10-11. The policy was enforced not only by training and the signs but through monitoring both remotely (video) and personally. *Id.* at p. 17-18, 19-20, 27; *Rushing Aff.*, ¶ 7-9.

III. CONSPIRACY

Finally, the Plaintiff alleges the County engaged in a civil conspiracy to deprive her of her rights in violation of 42 U.S. C. § 1985(3). *Compl.* ¶ 22. To state a § 1985(3) claim, a plaintiff must demonstrate "(1) a conspiracy between two or more people, (2) for the purpose of depriving a person or class of the equal protection of the laws, and (3) an act that furthers the conspiracy, (4) whereby a person is injured in his person or property or denied any right or privilege of a citizen of the United States." *McCoy v. Homestead Studio Suites Hotels*, 177 Fed. Appx. 442 (5th Cir. 2006). The Fifth Circuit has explained that "[e]ssential to the [§ 1985(3)] claim . . . is that the conspiracy be motivated by racial animus." *Word of Faith World Outreach Ctr. Church v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996); see also, *Galloway v. State of Louisiana*, 817 F.2d 1154, 1159 (5th Cir. 1987)(must prove a discriminatory animus based on race or some other inherited or immutable class characteristic such as gender, religion or national origin or based upon political association or beliefs). Mere conclusory allegations of deprivations of constitutional rights or bald assertions that a conspiracy exists are insufficient to state a section 1985(3) claim; rather, plaintiffs "who assert conspiracy claims under civil rights statutes must plead the operative facts upon which their claim is based." *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987).

In this case, the Plaintiff cannot demonstrate any of the elements required to establish a claim under Section 1985(3). The Plaintiff cannot prove that any Lincoln County employee made any agreement with any person to commit acts which would deprive her of equal protection of the law. See, *Johnson v. Danos & Curole Marine Contractors, Inc.*, 1993 U.S. Dist. LEXIS 10510, 1993 WL 292993, at *3 (E.D. La. 1993). Furthermore, she cannot demonstrate any act taken in furtherance of any such conspiracy or that the alleged conspiracy was motivated by a racial animus.

CONCLUSION

For the reasons set out hereinabove as well as in Lincoln County's Motion for Summary Judgment, Lincoln County and Sheriff Rushing, officially, are entitled to a judgment as a matter of law.

DATE: October 2, 2013.

Respectfully submitted,

LINCOLN COUNTY, MISSISSIPPI,
AND STEVE RUSHING, OFFICIALLY

BY: /s/William R. Allen
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CERTIFICATE

I, the undersigned of Allen, Allen, Breeland & Allen, PLLC, hereby certify that on this day, I electronically filed the foregoing Sheriff Steve Rushing (officially) and Lincoln County, Mississippi's Memorandum of Authorities in Support of Motion for Summary Judgment with the Clerk of the Court using the ECF system which gave notice to of same to the following:

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This the 2nd day of October, 2013.

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